



Submission to the Fixed Services Review; Second Position Paper

July 31, 2007

Introduction

The CCC is pleased to be able to comment on the Fixed Services Review, Second position Paper. The CCC represents non-dominant carriers in the Australian market operating in all major markets. Collectively, the CCC members have invested in the order of \$5 billion in competitive infrastructure in the Australian market.

Importantly, the CCC members represent the competitive pioneers of many of the most important innovations in services and pricing in telecommunications market. They have led progress up the so-called ladder of investment in order to support these innovative business plans. Therefore, the members of the CCC experience directly the areas in which the regulatory regime operates to effectively support competition and the areas of weakness.

The CCC urges the Commission to proceed with great caution in making fundamental changes to its regulatory approach, especially in the present environment. Confidence in the telecommunications industry is presently very low and uncertainty very high, as a consequence of an unremitting campaign by Telstra over the past two years to undermine competitors' business plans.

ACCC itself notes that fragility of competition in the Telecommunications Competitive Safeguards report 2005-06, as per below;

While there has been improvements in service quality and price competition as a result of these substantial and rapid increases in investment in infrastructure, competition for the delivery of services to end users remains fragile. Access seekers remain reliant on Telstra's ULLS and LSS services, and thus are exposed to substantial risks of unforeseen changes to the price and non-price terms and conditions of access which may harm their ability to access Telstra's network in an equivalent manner to Telstra. Furthermore, competitors are also exposed to significant risks arising from the prospective roll-out of an FTTN network.

Geographic Markets and Declaration Removal

The proposal to move to geographical market definitions, and to withdraw some services from declaration where competition exists, is sensible on its face, but hugely complex when the practical application of this principle is considered.

Issues to consider include:

- The CCC accepts that the principle of the removal of declaration in defined geographic locations can be consistent with the regulatory framework and practical in relation to services such as transmission. But this is because transmission routes are by definition geographically distinct and severable. The market for transmission services on a particular route can be said to be

competitive if several infrastructure owners operate on the same route. But on an exchange basis, end user access still depends on the regulated access to the last mile from the exchange, no matter how many independent DSLAM owners operate in that exchange. This makes regulation at the exchange very different from regulation of transmission.

- services such as wholesale voice services are not delivered in geographically definable markets, but are national, and have complicated and changing inter-relationships with other services, regulated and unregulated. They are more usually, and more easily, defined in terms of wholesale and retail markets, not locations.
- Related to this, the CCC foresees market definition conflicts in a move to consider declarations on the basis of the location of equipment. This is because there might be different retail markets being served from one exchange. For example, it might be argued that multiple providers of residential broadband in an exchange utilizing the LSS is indicative of a competitive market. But if those service providers wish to progress up the ladder of investment and add further services, they are likely to require access to wholesale voice services. This also raises the issue around other gaps in the regulatory regime that mean there is no easy transition from LSS to ULLS, as discussed above.
- it must be noted that the corollary of the idea that some services can be withdrawn in locations where competition has developed is that regulation must increase in locations where there is little prospect of this happening. That is, to be truly holistic, geographic regulatory approaches must not only be about removing declarations but must also acknowledge that some markets are too “thin” for quasi-infrastructure competition. This means the Commission should give at least equal weight to proposals that more wholesale services are declared to the idea that some declarations can be removed. For example, the CCC strongly believes that that history of regulatory conflict and anti-competitive activity around wholesale ADSL services requires the Commission to declare these services at least in locations where competitive DSLAMs are not installed.
- Apart from these issues around the practical applications of the principle, the CCC submits that the Commission must consider any changes in its approach to regulation in the context of the regulatory conflict presently weighing down the industry. In particular, the Commission must be mindful of the way past changes in policy and regulatory approach have been exploited for any new gaming opportunities they represent and assess the likelihood of this being repeated in the light of the recent behaviour by Telstra. It is especially crucial that caution is taken in a period of historic uncertainty for access seekers. This consideration pertains equally to the issue of holistic reviews discussed below.

Proposal for Holistic Reviews

The CCC submits that a truly holistic approach to the regulation of individual services would require changes in approach and a range of actions far beyond simply conducting reviews at the same time.

Rather, the CCC would submit that there are a number of issues that should be addressed to fill gaps in the reach and coverage of the present regulatory arrangements.

Among these issues are:

- The inter-relationship between regulated services, the reliance on “quasi-infrastructure” competition and the emergence of threats to the continued availability of those services mean that the focus should be on ensuring that there are no “escape hatches” for Telstra in the existing network. That is, it must not be possible for Telstra to by-pass regulated access, or to force access seekers to take a service that disadvantages them relative to other service, by making changes to its network, large or small.
- The related issues arising from the lack of processes supporting competitors as they seek to move up the ladder of investment. These relate to, for example, the absence of established processes to allow the smooth transition of end users from wholesale ADSL services to LSS and ULLS based services without disruption to the end user’s service.
- The potential for changes to the timing of reviews and the consolidation of those into a single “window” to be gamed.

The CCC, in its submissions to the first fixed network discussion paper and, indeed, in representations to the Commission before that paper’s release, has urged the Commission to inquire into the regulatory arrangements needed to ensure competitive access to the Telstra network where RIMs have been deployed. Further, the CCC believes the Commission should, as a matter of urgency, initiate an inquiry into the appropriate access to Fibre to the Home/Premises access networks.

FTTH networks are increasingly being deployed by Telstra and other network owners in greenfields locations. RIMs, a network architecture fundamentally similar to the proposed FTTN networks discussed by Telstra and G9, have been utilized in locations across Australia, often in newer residential developments.

Members of the CCC have sought access to both RIMs and FTTH in locations where Telstra is installing or has installed them, without success. The CCC understands these issues have been raised with the Commission by individual CCC member companies.

Again, the CCC urges the Commission to initiate a declaration inquiry into access to those parts of the access networks that utilise RIM architecture, taking into account Telstra's recent core switching upgrades.

Positive Aspects of Holistic Regulation

The CCC acknowledges that an holistic approach to regulatory reviews could provide some benefits to access seekers. These would primarily stem from the increased certainty that would be derived from a single cycle of regulatory decision making around access arrangements (especially price) to essential access services.

The alignment of these decisions would create a closer fit between the timing of regulatory guidance and investment decisions. Investment decisions are made on the three to five year projected recovery period, the staggering of regulatory processes has meant that there has been a corresponding lack of regulatory certainty around some of these investments.

Risk of Gaming and Climate of Uncertainty

As discussed above, consideration must be given to the practical application of any proposed changes in approach to regulatory practice, and this must reflect the environment in which the regulator, access seekers and access providers operate. This raises concerns for the CCC about how a holistic approach to reviewing declarations as described in the ACCC discussion paper could and would be gamed by Telstra.

It has become painfully clear in recent years that Telstra will seek to game any regulatory process it can in order to create confusion, delay and uncertainty. While in a perfect world it would be sensible to seek to address all services simultaneously, the CCC believes that such circumstances could and would be manipulated by Telstra in order to seriously disadvantage access seekers and the make the task of the Commission all but impossible.

Evidence of this can be seen in the attitude Telstra has shown in recent years to undertakings and arbitrations.

The Commission itself has expressed its belief that undertakings have been abused and Telstra has presented undertaking it knew could not be accepted in ways that were vexatious and designed to disrupt the industry rather than to create the certainty that these instruments were designed to afford the industry.

Similarly, Telstra is the responding party in the vast majority of the more than 40 arbitrations presently before the Commission. Many of these arbitrations consider the same issues in relation to the same services, but Telstra has refused to contemplate letting the Commission resolve these issues in one dispute and then accepting the same terms

with other access seekers. Instead, it insists on drawing as many access seekers as possible in expensive disputes.

Even in instances where Telstra is the access seeker, the CCC sees clear evidence of Telstra manipulating the processes. For example, it is clear that Telstra initiated access disputes for MTAS rates in the brief window where the Commission did not have published indicative rates earlier this year.

The CCC believes Telstra's motivation is clear. It has the resources to conduct any number of regulatory disputes or processes and in so doing put unsustainable strain on the resources of its competitors.

The CCC submits that there is a very high level of risk that the Telstra response to a move to consolidate reviews of declarations would be to create a regulatory logjam in the lead up to that review in order to make it impossible for some competitors – and, we submit, the Commission itself – to devote the appropriate attention and level of resources to the declaration process. While some competitors have the internal resources to be able to respond to such conduct by Telstra, such a development would place greater strain on the resources of the smaller access seekers. This in turn would make it difficult for the Commission to be confident that it had had the opportunity to inform itself about the views of all access seekers affected by its decisions.

Further, the announcement by the Minister of Communications in June that she was establishing an expert task force to facilitate a tender process for proposals to build a fibre access network in capital cities has the potential to fundamentally change the regulatory landscape. In particular, it would be expected that there would be a need for new regulated access services to be made available to ensure competition was facilitated in the event of a new access network build.

At this stage, the timing of the expert taskforce's process remains somewhat uncertain. However, it would appear unlikely that the decisions about the arrangements under which a new or upgraded access network would be built will be concluded before the middle of 2008.

The geographic extent of any new network would also change over time. The CCC submits that these changes would mean that an attempt to design an holistic approach to reviewing access arrangements and declarations ahead of the conclusion of the taskforce deliberations could be a doomed exercise. The CCC submits that the regulated arrangements for a fibre access network should be finalized first.

Therefore, while acknowledging that the idea of an holistic approach has some merit in theory, the CCC takes the view that, on balance, it would be prudent to delay a decision on such a change in approach until there has been a conclusion to the FTTN decision making processes, and probably until after the 2009 policy review.

Other Issues: Threshold Tests: What is sustainable competition?

In suggesting it take an exchange by exchange approach, presumably the ACCC is suggesting it would have to examine how many access seekers have deployed equipment in exchanges.

This raises numerous questions immediately. How many access seekers? What if one withdraws or is acquired by another? What happens if TLS partly deploys a FTTN/RIM from that exchange, reducing the addressable market?

Also, as discussed above, what if competitors' equipment is installed but the competitors are utilizing LSS and not ULLS? LSS requires access to wholesale voice services if competitors are to progress up the ladder of investment as envisaged by the Commission. The CCC has already raised concerns with the Commission about the impact of the lack of automated processes to allow access seekers to transition from LSS to ULLS, inhibiting the ability of competitors to move away from reliance on these wholesale voice services.

Conclusion

The CCC believes that the issues raised by the Commission in the Fixed Network Review papers are far reaching and profound. They deserve to be considered fully and thoroughly. However, the present environment is one in which uncertainty has never been greater, competitors' business plans never more insecure, and Telstra never more aggressive in seeking to undermine the proper functioning of the policy and regulatory environment.

Competitors in this environment cannot be expected to be able to properly consider all of the implication of the changes proposed in the Commission's papers, and, we submit, the CCC cannot be confident that it fully understands the consequences of any changes to might make at this time.

We therefore urge the Commission to reach no conclusions on these proposals until at least the FTTN expert taskforce process has reached a conclusion. In the meantime, it is crucial that the Commission begin considering how those parts of the network that are not available to access seekers via LSS and ULLS, such as locations served by RIMs or where FTTH has been deployed, need to be regulated so that end users in those locations can also benefit from competition.

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